

HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

KEVIN ZWICKER and TERESA K. PALMER,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a
Delaware corporation,

Defendant.

MDL No. 1896

NO. C07-0291 JCC

**PLAINTIFFS' MOTION FOR
APPEAL BOND**

Noted for Consideration:
Friday, December 26, 2008

ORAL ARGUMENT REQUESTED

ROY FALK, LEE KRATZER and BARBARA
McRAE, on behalf of themselves and all others
similarly situated, and on behalf of the general
public,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a
Delaware corporation,

Defendant.

NO. C08-0031 JCC

1 CHRIS CHRISTENSEN, TERRY M. KELLY,
2 and PEGGY KELLY, on behalf of themselves
and all others similarly situated,

3 Plaintiffs,

4 v.

5 GENERAL MOTORS CORPORATION, a
Delaware corporation,

6 Defendant.

NO. C08-0032 JCC

7 I. RELIEF REQUESTED

8 Plaintiffs move the Court for an order requiring *pro se* objector, Clyde F. Padgett, to
9 pose an appellate cost bond in the amount of \$40,811.20 within two weeks of the entry of this
10 order. Mr. Padgett filed an appeal of the final judgment in this case on November 28, 2008.

11 II. ARGUMENT

12 Rule 7 of the Federal Rules of Appellate Procedure empowers a United States District
13 Court to “require an appellant to file a bond or provide other security in any form and amount
14 necessary to ensure payment of costs on appeal.” Fed. R. App. P. 7. In applying this rule,
15 “[t]he determination of the amount of a bond necessary to ensure payment of costs on appeal is
16 left to the discretion of the district court.” *In re Heritage Bond Litig.*, No., MDL 02-ML-1475
17 DT, 2005 U.S. Dist. LEXIS 13627 (C.D. Cal. Sept. 12, 2005) (citing *Young v. New Process*
18 *Steel*, 419 F.3d 1201, 1203 (11th Cir. 2005)). The term “costs on appeal” in Rule 7 includes all
19 expenses defined as “costs” by an applicable fee-shifting statute, including attorney’s fees.
20 *Azizian, et al. v. Federated Dep’t Stores, Inc., et al*, 499 F. 3d 950, 958 (9th Cir. 2007). As
21 discussed below, California Civil Code § 1780(d), of California’s Consumer Legal Remedies
22 Act (hereinafter “CLRA”) is the applicable fee-shifting statute here. Pursuant to this statute, a
23 prevailing plaintiff is entitled to an award of court costs and attorneys’ fees, and a prevailing
24 defendant may also obtain fees and costs under certain circumstances. The Court should
25 require Mr. Padgett to post a bond to secure payment of attorneys’ fees and costs likely to be
26 awarded on appeal.
27

A. The Court Should Include Anticipated Attorneys' Fees In its Calculation of the Amount of the Bond.

Plaintiffs Roy Falk, Lee Kratzer and Barbara McRae are all citizens of the State of California. *See Second Amended Class Action Complaint* (Dkt. # 74) at ¶¶ 7-9. Each Class representative brought claims against Defendant General Motors ("GM") pursuant to the CLRA, Cal. Civ. Code § 1780 *et seq.* *Id.* at ¶ 58. Section 1780(d) of the CLRA provides that the court "shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith." Cal Civ. Code § 1780(d).

In *Azizian, supra*, the Ninth Circuit held that the term "costs on appeal" in Rule 7 could include attorneys' fees depending on the form of the applicable fee-shifting statute. *Azizian* 499 F.3d at 959-60. In contrast to the fee shifting provision of the CLRA, the Ninth Circuit found the fee statute at issue in *Azizian*, Section 4 of the Clayton Act, to be "asymmetrical." That is, only plaintiffs could recover attorneys' fees and only if they won. If a plaintiff lost, defendants could not collect attorneys' fees as the prevailing party. *Id.* Because of this asymmetry, the appellate court found that the fee provision of Section 4 of the Clayton Act serves the purpose of penalizing and deterring those who violated the antitrust laws. *Id.* at 960. Hence, the Court of Appeals found that the district court's Rule 7 bond improperly included security for attorneys' fees. *Id.* at 960.

Section 1780(d) of the CLRA, by contrast, is "symmetrical." That is, it enables either an appellee or appellant to collect costs and fees on appeal. Cal Civ. Code § 1780(d). Consequently, the CLRA is more similar to the fee shifting provisions of the Copyright Act, 15 U.S.C. § 15(a), and the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988(b), than the Clayton Act. *See Azizian*, 499 F.3d at 960. The Copyright Act, like the CLRA,

1 provides for an award of reasonable attorney's fees to the prevailing party.¹ Similarly, the Civil
 2 Rights Attorney's Fees Award Act authorizes a court to award attorneys' fees to the prevailing
 3 party.² Because these fee provisions are symmetrical, they serve a different purpose. They
 4 enable plaintiffs to bring damage actions on claims that might otherwise be economically
 5 unfeasible to litigation while at the same time discouraging frivolous litigation with the threat
 6 that a plaintiff may have to pay the fees of opposing counsel if they lose. *See generally*,
 7 *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114, S.Ct. 1023, 127 L.Ed.2d 455 (1994) (discussing
 8 the Copyright Act's fee shifting provision and finding that both plaintiffs and defendants may
 9 recover attorneys' fees under its provisions); *King v. Ill. State Bd. of Elections*, 410 F.3d 404,
 10 412 (7th Cir. 2005) ("As an initial matter, we point out that the language of [the Civil Rights
 11 Attorney's Fees Award Act] does not preclude defendants or defendant-intervenors from
 12 recovering attorneys' fees.") The CLRA's fee-shifting provision also permits defendants to
 13 recover attorneys' fees and costs. Cal. Civil Code. § 1780(d).

14 The "prevailing party" standard is a relatively low bar for an award of attorney's fees
 15 and would be satisfied here if the Class were to prevail upon appeal. To be a "prevailing party"
 16 for the purpose of awarding attorneys' fees, a litigant must meet two criteria: (1) "he must
 17 achieve a 'material alteration' of the legal relationship of the parties", and (2) "that alteration
 18 must be "judicially sanctioned." *Carbonell v. INS*, 429 F. 3d 894, 898 (9th Cir. 2005). The
 19 fact that the parties have settled does not eliminate the ability to be declared a prevailing party,
 20 particularly where, as here, the parties agreed in their settlement that the district court retains
 21 jurisdiction over the settlement. *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 n.5
 22 (9th Cir. 2002).

23
 24 ¹ "In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against
 25 any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court
 may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505.

26 ² "In any action or proceeding to enforce a provision of sections 1977 ... the court, in its discretion, may allow the
 27 prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. §
 1988(b).

Requiring Mr. Padgett to post fees and costs in the form of a bond is consistent with the purpose of the CLRA's fee shifting statute. That same purpose is served by awarding fees to an appellant who must incur costs and fees to oppose the appeal of a lone objector to a Court-approved settlement especially where, as here, the appeal will deny relief to approximately 746,000 class members.³

B. Plaintiffs Are Highly Likely to Prevail Upon Appeal.

Plaintiffs have confidence that the Court of Appeals will find that this Court correctly overruled Mr. Padgett's objections and found that they did not warrant disapproval of the Settlement. Mr. Padgett objected to the settlement on three grounds – although he apparently did not feel strongly enough about any of his objections to attend the final approval hearing. First, he contends that the Settlement is unfair because it does not provide any benefit to owners of vehicles with more than 80,000 miles. *See Verified Objection to Proposed Settlement Agreement, Notice of Intent to Appear, and Motion to Intervene* (“*Verified Objection*”) (Dkt. #150) at 3-4. Second, he claims that the requested fees and costs are unreasonable in light of the benefits to the class. *Id.* at 4-5. Finally, Mr. Padgett claims that the Settlement Agreement is a “windfall” for GM. *Id.* at 5-6. None of these claims are supported by any record evidence. Each may be readily dismissed.

First, the fact that some class members may be now or may soon become ineligible to receive benefits under the Settlement does not render the Settlement unfair or unreasonable to the Class as a whole. This settlement, like all settlements, is a compromise. Continuing to push for greater benefits would have been risky for several reasons: First, the Class would risk obtaining adverse rulings or an adverse judgment in GM's favor. Second, as more time passed, more class members would become ineligible for benefits as their vehicles aged or were sold. Finally, the Class faced – and still faces – the risk that GM will be unable to fund any

³ See Olson Decl. ¶ 4. With the passage of time, many class members will be unable to obtain relief even if the appeal is ultimately denied since the Settlement only provides benefits to vehicles with mileage of 80,000 or less.

1 settlement or judgment due to its precarious finances. Ironically, Mr. Padgett's appeal itself
 2 serves to increase these risks at a time when GM faces the imminent threat of bankruptcy (it
 3 says it needs government money to survive through the end of 2008) and seeks government aid.

4 Further, Mr. Padgett's objection to the award of attorney's fees and costs ignores
 5 completely Class Counsel's estimate that the Settlement will cost GM in excess of \$100
 6 million. Not only does Mr. Padgett fail to refute this estimate, he totally ignores it. As
 7 Plaintiffs have demonstrated, the requested fee is a small percentage (2.3%) of the
 8 conservatively estimated benefit. *See Plaintiffs' Reply Brief in Support of Motions For Final*
 9 *Approval and Attorneys' Fees and Costs* (Dkt. # 163) at 10.

10 Finally, Mr. Padgett's contention that GM's \$100 million plus exposure somehow
 11 creates a "windfall" and is a "reward[] for [GM's] deceitful conduct" is nonsense. *Verified*
 12 *Objection* at 5-6. If anything, Mr. Padgett's appeal itself is a holiday gift to GM. His appeal
 13 will allow GM to avoid providing benefits under the Settlement until it is resolved. Worse yet,
 14 if during the pendency of Mr. Padgett's appeal GM declares bankruptcy, the Class is unlikely
 15 to receive any benefits at all. For all of these reasons, the Class is highly likely to prevail on
 16 appeal and, as the prevailing party, be eligible to receive payment of attorney's fees and costs
 17 from Mr. Padgett.

18 **C. The Amount Of The Requested Bond Is Appropriate.**

19 Taxable costs include: (1) the preparation and transmission of the costs of the record;
 20 (2) the reporter's transcript, if needed; (3) the premiums paid for a supersedeas bond or other
 21 bond preserving rights pending appeal; (4) the fee for filing the notice of appeal; and (5) in the
 22 narrowly defined circumstances set forth above, attorneys' fees that may be assessed on appeal.
 23 *See Fed. R. Civ. P. 7; Pedraza*, 313 F.3d 1323,1333 (11th Cir. 2002); *see also In re: Cardizem*
 24 *CD Antitrust Litig.*, 391 F.3d 812, 817 (6th Cir. 2004); *cert denied*, 544 U.S. 1049, 125 S.Ct.
 25 2297, 161 L.Ed.2d 1089; *Barnes v. FleetBoston Fin. Corp.*, No. 01-10395-NG, 2006 U.S. Dist.

1 LEXIS at 71072 * 2 (D. Mass. August 22, 2006). (Attached hereto as Exhibit A). Here, the
 2 Class respectfully requests that the bond include the following:

3 1. The cost of appeal in the amount of \$1,000. *See In re: Cardizem*, 391 F.3d at
 4 815 (inclusion of \$1,000 in filing and brief preparation costs).

5 2. Attorneys' fees the Class will incur on appeal. The Class estimates appellate
 6 attorneys' fees of \$30,000. *See Pedraza*, 313 F.3d at 1328 (anticipated appellate attorney's fees
 7 of \$29,000.00 per appellant).

8 3. Interest on unpaid attorneys' fees. *Barnes*, 2006 U.S. Dist. LEXIS 71072 at * 2
 9 (bond may include costs attendant to delay associated with an appeal. Plaintiff calculates the
 10 amount of interest as follows: .96% interest on the unpaid portion of the attorney's fees and
 11 costs of \$1,022,000. Assuming the case takes only one year to go through the appellate
 12 process, that amount would be \$9,811.20.⁴

13 As a result, the total bond should therefore be for \$40,811.20. The Class believes this
 14 amount is appropriate under the circumstance of this case and allowed by law,

15 III. CONCLUSION

16 For all of the foregoing reasons, the Class respectfully moves this Court to order
 17 Objector Clyde F. Padgett to post an appellate cost bond in the amount \$40,811.20 to ensure
 18 recoupment of the costs of appeal. A proposed Order is attached hereto.

19
 20
 21
 22
 23
 24
 25
 26 ⁴ 28 U.S.C. 1961 allows interest on any money judgment at a rate equal to the weekly average 1-year constant
 27 maturity Treasury yield. 28 U.S.C. 1961(a). For the week ending November 21, 2008, the rate is .96%. *See www.*
utd.uscourts.gov/documents/int2008.html.

1 DATED this 5th day of December, 2008.

2 TOUSLEY BRAIN STEPHENS PLLC

3 By: /s/ Mary B. Reiten, WSBA #33623

4 Kim D. Stephens, WSBA #11984

5 kstephens@tousley.com

6 Mary B. Reiten, WSBA #33623

7 mreiten@tousley.com

8 1700 Seventh Avenue, Suite 2200

9 Seattle, Washington 98101-4416

10 Telephone: 206.682.5600

11 Facsimile: 206.682.2992

12 Gary E. Mason, Admitted *Pro Hac Vice*

13 gmason@masonlawdc.com

14 THE MASON LAW FIRM, LLP

15 1225 19th Street NW, Suite 500

16 Washington, DC 20036

17 Telephone: 202.429.2290

18 Facsimile: 202.429.2294

19 Kevin L. Oufnac, Admitted *Pro Hac Vice*

20 kevin.oufnac@kgsounsel.com

21 KAHN GAUTHIER SWICK LLC

22 650 Poydras Street, Suite 2150

23 New Orleans, Louisiana 70130

24 Telephone: 504.455.1400

25 Facsimile: 504.455.1498

26 Michael F. Ram, Admitted *Pro Hac Vice*

27 mfr@lrolaw.com

Karl Olson

ko@lrolaw.com

LEVY, RAM & OLSON

639 Front Street, Fourth Floor

San Francisco, California 94111

Telephone: 415.433.4949

Facsimile: 415.433.7311

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Jeffrey R. Johnson, WSBA #11082
Email: jjohnson@wkg.com
John A. Knox, WSBA #12707
Email: jknox@wkg.com
WILLIAMS, KASTNER & GIBBS PLLC
P.O. Box 21926
Seattle, Washington 98101
Telephone: 206.628.6600
Facsimile: 206.628.6611

Micki S. Singer
Email: micki.singer@sdma.com
SEDGWICK, DETERT, MORAN & ARNOLD LLP
One Market Plaza, Steuart Tower, 8th Floor
San Francisco, California 94105
Telephone: 415.781.7900
Facsimile: 415.781.2635

Amand K. Mines
Email: amand.mines@sdma.com
Jacqueline M. Jauregui
Email: jacqueline.jauregui@sdma.com
SEDGWICK, DETERT, MORAN & ARNOLD LLP
801 South Figueroa Street, 19th Floor
Los Angeles, California 90017
Telephone: 213.426.6900
Facsimile: 213.426.6921

E. Paul Cauley, Jr.
Email: paul.cauley@sdma.com
SEDGWICK, DETERT, MORAN & ARNOLD LLP
1717 Main Street, Suite 5400
Dallas, Texas 75201-7367
Telephone: 469.227.8200
Facsimile: 469.227.8004

Attorneys for Defendant

1 I mailed copies of the foregoing to Objector:

2 Clyde F. Padgett, *pro se*
3 910 McGregor Street
4 Lufkin, TX 75901
Telephone: (409) 639-2769
Facsimile: (409) 634-0421

5 DATED at Seattle, Washington, this 5th day of December, 2008.

6
7 By: /s/ Kim D. Stephens, WSBA #11984
8 Kim D. Stephens, WSBA #11984
9 kstephens@tousley.com
10 Mary B. Reiten, WSBA #33623
11 mreiten@tousley.com
12 1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-4416
Telephone: 206.682.5600
Facsimile: 206.682.2992

13 *Attorneys for Plaintiffs*
14
15
16
17
18
19
20
21
22
23
24
25
26
27